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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS,AAO,20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Miami Date: SEP 26 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the decision of the acting district director to deny the application. The AAO again affirmed the prior decisions on a motion to reopen. The matter is again before the AAO on a second motion to reopen. The motion will be granted, the previous decisions of the AAO will be withdrawn, and the application will be approved.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act of November 2, 1966.

The acting district director originally denied the application after determining that the applicant was inadmissible to the United States because she fell within the purview of section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(II).

The AAO reviewed the record of proceeding and concurred with the acting district director's conclusion that the applicant was inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act based on her conviction of possession of a controlled substance (cocaine) for which no waiver is available. The AAO, therefore, affirmed the acting district director's decision on January 17, 2002.

On February 19, 2002, counsel filed a motion to reopen asserting that the applicant is eligible for adjustment of status as she no longer has a conviction because on August 17, 2001 the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida vacated the applicant's conviction of possession of cocaine, under Case No. 88-15318, and entered a "nolle pros" on the case.

The AAO noted, however, that counsel neglected to submit the petition/motion to vacate which would show the exact reason for dismissal of the case. Citing *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), and *Matter of A-F-*, 8 I&N Dec. 429 (BIA, A.G. 1959), the AAO maintained that if the vacation was an expungement, the expungement of drug-related convictions does not eliminate the convictions for immigration purposes. The AAO, therefore, concluded that the applicant remained inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(II) of the Act, and affirmed its prior decision on August 23, 2002.

On September 25, 2002, counsel filed another motion to reopen. She submits a copy of the Defendant's Rule 3.850 Motion to Vacate Judgment, filed by the applicant in the 11th Judicial Circuit Court on December 15, 2000. The motion seeks to vacate the judgment and

withdraw her guilty plea because she "entered a plea in this cause without being advised of the potential immigration consequences of the entry of such a plea by the trial court. Had she been so advised she would not have entered the plea."

The Florida Rules of Criminal Procedure, Rule 3.850, Motion to Vacate, Set Aside, or Correct Sentence states, in part:

> The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court establish by the laws of Florida:
>
> (1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.
>
> (2) The court did not have jurisdiction to enter the judgment.
>
> (3) The court did not have jurisdiction to impose the sentence.
>
> (4) The sentence exceeded the maximum authorized by law.
>
> (5) The plea was involuntary.
>
> (6) The judgment or sentence is otherwise subject to collateral attack.

On August 17, 2001 the court vacated the finding of guilt, the judgment, the sentence, the plea, and the court costs relating to the criminal proceedings against the applicant in Case No. 88-15318, based on Florida Rule 3.850.

Accordingly, the order of the Florida court does not constitute a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute, as in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Florida Rule 3.850, the criminal law provision under which the conviction was vacated, is neither an expungement nor a rehabilitative statute. The applicant's conviction was vacated on the legal merits of the case, as if the conviction had never occurred, and not as an administrative expungement. Therefore, the criminal conviction upon which the charge of inadmissibility is based has been vacated and the applicant is no longer inadmissible. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).

The applicant, therefore, is admissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, eligible for

adjustment of status to permanent residence pursuant to section 1 of the Act of November 2, 1966, and warrants a favorable exercise of discretion. The acting district director did not find the applicant ineligible under any other provisions of the Act. The decisions of the acting district director and the AAO will be withdrawn, and the application will be approved.

ORDER: The decisions of the acting district director and the AAO are withdrawn. The application is approved.